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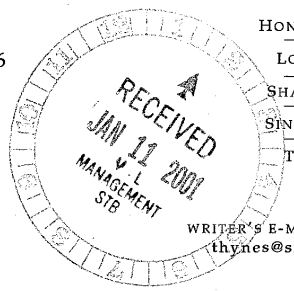

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January 11, 2001

ENTERED
Office of the Secretary
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Public Record

Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: STB Ex Parte No. 582 (Sub-No. 1); Major Rail Consolidation Procedures

Dear Mr. Williams:

Enclosed for filing in the above-captioned proceeding are the original and twenty-five (25) copies of Canadian Pacific Railway Company's Rebuttal Comments (CPR-6). Also enclosed is a computer disk containing a copy of this submission in WordPerfect format.

Please date-stamp the two (2) extra copies of the enclosed filing and return them via our messenger.

Sincerely,

Terence M. Hynes

Enclosures

cc: All Parties of Record

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CPR-6

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY REGARDING PROPOSED RAIL CONSOLIDATION REGULATIONS

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DATED: January 11, 2001

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REBUTTAL COMMENTS OF CANADIAN PACIFIC RAILWAY COMPANY
REGARDING PROPOSED RAIL CONSOLIDATION REGULATIONS

Pursuant to the Board's October 3, 2000 Notice of Proposed Rulemaking in the above-captioned proceeding (the *"NPR Order"*), Canadian Pacific Railway Company and its wholly-owned subsidiaries, Soo Line Railroad Company ("Soo"), Delaware and Hudson Railway Company, Inc. ("DHRC"), and St. Lawrence and Hudson Railway Company Limited ("St.L&H") (collectively "CPR") submit these rebuttal comments concerning proposed modifications to the Board's Railroad Consolidation Procedures (49 C.F.R. §§ 1180.0-1180.9).

CPR has previously submitted detailed comments addressing a variety of issues raised by the Board's proposed merger regulations.[1] In these Rebuttal Comments, CPR will

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[1] *See* CPR-2, Comments of Canadian Pacific Ry. Co (May 16, 2000); CPR-3, Reply Comments of Canadian Pacific Ry. Co. (June 5, 2000); CPR-4, Comments of Canadian Pacific Ry. Co. Regarding Proposed Rail Consolidation Regulations (November 17, 2000); CPR-5, Reply Comments of Canadian Pacific Ry. Co. Regarding Proposed Rail Consolidation Regulations (December 18, 2000).

respond briefly to certain statements and proposals made by parties in Reply Comments filed on December 18, 2000.

I. COMPETITION ISSUES

Several parties contend that the STB's merger rules should assume that any new Class I merger proposal will inevitably trigger an "end-game" leading to two continent-wide rail systems. For example, UP urges the Board to require that market impact analyses submitted in connection with future merger applications "evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads."[2] USDOT goes even further, suggesting that the STB convene a new proceeding to consider the public interest implications of a hypothetical rail duopoly ***before*** any additional mergers are actually proposed.[3] According to USDOT, such a proceeding would "provid[e] advance guidance" to prospective applicants and potentially "avoid[] the cost and disruption of a rejected merger." *Id.*

The STB's governing statute, and fundamental principles of administrative law, require that the Board's decisions in rail merger proceedings be based on substantial record evidence.[4] USDOT's proposal -- under which the STB would, in effect, pass judgment on all potential Class I consolidations before any such transaction is even proposed -- is simply not

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[2] *See* Union Pacific's Reply Comments on Proposed Merger Rules (December 18, 2000) at 9. *See also* Reply Comments of Edison Electric Institute at 1, 16-17; Reply Comments of Montana Wheat & Barley Committee at 1-2.

[3] *See* USDOT Reply Comments at 11.

[4] *See, e.g.*, CPR Comments (November 17, 2000) at 10-13; CPR Reply Comments at 9-10.

realistic. In the absence of actual merger proposals, any attempt to weigh the cumulative public benefits and harms of a hypothetical merger "end game" would require the parties and the Board to engage in an excessive degree of speculation. Indeed, it would be virtually impossible for the STB to measure the likely benefits of another round of mergers without any concrete evidence concerning the nature of those transactions, or the specific operating, marketing and investment initiatives that the merging carriers might undertake. For these reasons, CPR urges the STB to consider future consolidations on a case-by-case basis, and to defer judgment on the merits of possible responsive mergers until the facts relating to such transactions are known.

In its Reply Comments, IMPACT suggests that the STB implement its proposed policy in favor of "enhanced" competition by requiring applicants to take measures (such as divesting lines) to introduce a second railroad at points served by only one railroad, and a ***third*** rail carrier at points served by two railroads, prior to the merger.[5] KCS argues that the STB should not approve any future merger unless applicants preserve ***all*** existing rail options (even at points served by three or more carriers prior to the merger).[6] These proposals should be rejected.

In essence, the IMPACT proposal calls for universal "open access" for shippers served by one (or even two) carriers prior to a merger. As the *NPR Order* recognized, it would be improper for the Board to use this rulemaking proceeding to effect such a sweeping overhaul of the current regulatory system.[7] The rigid rule proposed by KCS with respect to points served by three (or more) carriers is likewise unwarranted. The STB should maintain its existing

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[5] IMPACT Reply Comments at 32.

[6] KCS Reply Comments at 8-9.

[7] *NPR Order* at 16-17.

case-by-case approach to evaluating situations in which a merger would reduce the number of rail competitors from three to two. The question whether the presence of two rail competitors would adequately constrain the potential exercise of post-merger market power is a highly fact-specific inquiry. The STB should examine the particular competitive circumstances affecting so-called "3:2" markets, and impose appropriate conditions where necessary to assure vigorous post-merger competition in those markets. The Board should, of course, continue its policy requiring that effective rail competition be preserved for any shipper whose rail options would be reduced from two to one as a result of a merger.

Finally, several parties urge the Board to broaden the proposed requirement that applicants "keep open major existing gateways" to include any and all interchange points over which traffic moved prior to the merger.[8] Such a requirement would impair the ability of the merged system to realize economies of density and to take advantage of more efficient post-merger routings, thereby lessening the public benefits of a consolidation. The STB should require only that the "major" east-west and north-south gateways be preserved in connection with any future Class I consolidation.[9]

II. TRANSNATIONAL ISSUES

In its prior comments, CPR demonstrated that there is no legitimate basis for imposing upon "foreign" rail merger applicants the unique nationality-based requirements set

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[8] *See, e.g.*, NITL Reply Comments at 13-14 (reiterating proposal that merging carriers be required to preserve all existing interchanges); USDA at 7 (applicants should be required to keep all existing gateways open); IMPACT at 15; Dow at 9.

[9] USDOT agrees that "only major gateways and routes should be included under this requirement." USDOT Reply Comments at 4 (emphasis in original).

forth in proposed § 1180.1(k)(1).[10] In their reply submissions, certain parties appear to misconstrue CPR's position with respect to these provisions. USDOT suggests that CPR opposes the development of a record adequate to enable the STB to evaluate a future cross-border consolidation.[11] The Port Authority of New York/New Jersey ("NYPA") argues that, by opposing these provisions, Canadian carriers seek to deny port interests the opportunity to address issues of potential port discrimination in future consolidation proceedings.[12] These assertions are incorrect.

CPR does not object to a requirement that Canadian rail merger applicants submit the same information – including "full system" operating and service plans, and market impact analyses – as domestic rail merger applicants. It is entirely appropriate for the Board to obtain information concerning the applicants' foreign (as well as U.S.) operations, in order to gauge the impact of a proposed cross-border transaction on the North American rail network as a whole. CPR also recognizes that exercise of the STB's conditioning power to remedy anticompetitive effects of a cross-border consolidation may, in appropriate circumstances, include relief involving trackage located outside the United States.[13]

What CPR ***does*** object to are regulations that impose different, or additional, substantive standards and evidentiary burdens on foreign applicants solely on the basis of their nationality. For example, proposed § 1180.1(k)(1) would require foreign applicants (but not their

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[10] *See* CPR Comments at 20-23; CPR Reply Comments at 13-19.

[11] *See* USDOT Reply Comments at 8.

[12] NYPA Reply Comments at 5.

[13] *See* CPR Reply Comments (June 5, 2000) at 17-18.

U.S. counterparts) to demonstrate affirmatively that their commercial decisions would be based upon economic self-interest rather than the wishes of a national or provincial government. NYPA and other port interests ask the Board to expand this provision to require foreign applicants to prove that they would not take any action harmful to a U.S. port. Yet, the regulations would not require NS or CSX to prove that they would not favor one Atlantic port over another, or BNSF and UP to show that they would not discriminate against any West Coast port. Nor would the regulations impose on U.S. applicants the burden of demonstrating that their operating plan and investment decisions would not give one state an advantage over another. Such nationality-based discrimination in the regulations, as currently drafted, conflicts with the trade policies embodied in NAFTA.

Contrary to NYPA's assertion, special regulations are not needed to afford it an opportunity to raise legitimate issues concerning potential port discrimination in connection with cross-border consolidation cases. Even without the proposed "national favoritism" provision, ports will be able to present evidence (and seek discovery) concerning such issues in any future proceeding. The Board will have ample authority to evaluate the impact of the transaction on U.S. ports, and to take whatever action may be necessary to protect the public interest.[14] USDOT (like CPR) urges the Board to "resist efforts to adopt standards addressing international rail rates,

[14] In light of NAFTA's objective of creating an integrated North American transportation system, STB merger policy should not favor U.S. ports over their Canadian counterparts. To the extent that traffic shifts from one port to another as a result of better service offered by a merged carrier, such diversion should be viewed as consistent with, rather than inimical to, the public interest, regardless of the locations of the involved ports.

equipment policies, or port service at the outset" and to deal with such issues on a case-by-case basis.[15]

III. DISCLOSURE OF SETTLEMENT AGREEMENTS

Certain parties suggest that future applicants be required to disclose the terms of all settlement agreements that they reach in connection with the transaction, whether or not such agreements otherwise require STB approval.[16] KCS proposes that applicants also be required to submit a detailed analysis of the projected traffic and operating consequences of each settlement agreement, and that other parties have an opportunity to comment, and seek conditions upon, such settlement agreements. *Id.*[17] The Board should reject these proposals.

As KCS itself acknowledges, the Board's longstanding policy has been to encourage private agreements as a means of resolving concerns raised by mergers.[18] Indeed, KCS argues that "[n]o new merger regulation should serve to inhibit the continued use of settlement agreements in merger cases." *Id.* But forced disclosure of the terms of all settlement agreements – particularly those involving entities who choose not to participate as parties to the proceeding – would have exactly that effect. Such a rule would make it impossible for applicants and their customers to resolve merger-related issues in private. KCS' further proposal that the

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[15] USDOT Reply Comments at 9.

[16] *See* KCS Reply Comments at 20-23, UP Reply Comments at 10-11.

[17] KCS would require disclosure whether or not the entity settling with applicants was a party to the STB proceeding. By contrast, under UP's proposal, settlement agreements would be disclosed where the party settling with applicants submits comments in support of the merger. UP Reply Comments at 10-11.

[18] KCS Reply Comments at 20.

STB entertain requests for "conditions" upon private settlement agreements would create a strong disincentive to settlement.[19]

There may, of course, be circumstances in which a settlement agreement itself raises significant public interest questions.[20] The STB can address such questions, and require whatever disclosure of settlement terms it deems appropriate, on a case-by-case basis. However, the Board should not impose a universal requirement that the terms of all private agreements entered into between applicants and other interested parties be disclosed.

IV. CLASSIFICATION OF CARRIERS

Several parties recommend that the definition of "major" transactions (to which the proposed new merger regulations would apply) be limited to those consolidations involving only the largest Class I carriers.[21] This proposal should be rejected. The STB's carrier classification system, which is used to categorize large and small carriers for a variety of regulatory purposes, provides a reasonable basis for differentiating between "major" and "minor" consolidation proposals as well. Indeed, it would be illogical to treat certain railroads as "Class I" carriers for most regulatory purposes, but to accord them different treatment in connection

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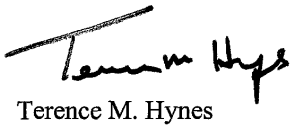
[19] It is not clear upon whom KCS would have the STB impose such conditions. The Board lacks authority to impose conditions on non-applicants (including shippers). To the extent that KCS envisions that the Board would impose conditions relating to a settlement upon applicants (*e.g.*, by requiring them to enter into similar agreements with others), the prospect of such a condition would clearly dampen applicants' incentive to enter into voluntary settlements.

[20] The "settlement" pursuant to which KCS entered into its "alliance" with CN/IC, and the agreement under which BNSF obtained extensive trackage rights over the UP/SP system, are recent examples.

[21] *See, e.g.*, KCS Reply Comments at 27-31; Wisconsin Central System Reply Comments at 3.

with transactions in which they proposed to combine with another major railroad. The STB's revised merger regulations should apply equally to all Class I carriers.

Respectfully submitted,



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DATED: January 11, 2001

CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of January, 2001, I served the foregoing Rebuttal Comments of Canadian Pacific Railway Company by messenger or postage prepaid, first class mail upon all parties of record.

Terence M. Hynes

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